No. 19-454

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations, and rule:

Miscellaneous—Continued: Page

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The Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18001 *et seq.*, does not itself require employers to provide contraceptive coverage. "Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of [the Department of Health and Human Services (HHS)], to make th[e] important and sensitive decision" whether to require it. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 697 (2014). Accordingly, an employer's "group health plan" is required to cover only such women's preventive services "as [HRSA] provide[s] for" and "support[s]." 42 U.S.C. 300gg-13(a)(4). That language plainly authorizes HRSA to require contraceptive coverage by most employers while exempting the small number of employers with sincere conscientious objections.

Respondents assert that Section 300gg-13(a)(4) instead gives HRSA an all-or-nothing choice: require *all*

"group health plan[s]" to provide coverage, or *none* to do so. But respondents effectively admit that their reading is inconsistent with the longstanding church exemption. And it would also mean that the existing "accommodation" violates Section 300gg-13(a)(4), particularly with respect to self-insured church plans that are effectively exempted from *any* requirement to provide the mandated coverage. Respondents offer no textual basis for that draconian and counterintuitive result.

The expanded religious exemption is also both required and authorized by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq*. Respondents' argument that the prior contraceptive-coverage mandate and accompanying "accommodation" did not violate RFRA is both wrong and irrelevant. It is wrong because that regime clearly forced some employers to engage in conduct they sincerely believe their religion prohibits—even as the government exempted other employers with the exact same objection. And respondents' argument is irrelevant, because even if RFRA does not *require* the expanded religious exemption, it clearly authorizes it. Indeed, respondents' contention that RFRA does not authorize any accommodation it does not affirmatively require is irreconcilable with this Court's decision in *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (per curiam), which ordered the agencies to consider further changes to the accommodation *even assuming that it fully complied with RFRA*.

The expanded exemptions are also procedurally valid. Respondents' argument that the agencies violated the notice-and-comment requirement of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq*., is wrong: the agencies provided notice of the

final rules, offered an opportunity to comment, and responded to all significant comments. That is all the APA requires. Otherwise, the contraceptive-coverage mandate and accompanying church exemption are likewise procedurally suspect, since they were issued using the same process. Respondents' assertion that a heightened standard applies in this context has no basis in the APA, and in any event is satisfied by the agencies' thoughtful consideration of all significant comments.

Finally, at a minimum, the Court should narrow the injunction's scope. Respondents have yet to identify a single person who would cause the harm to them on which the nationwide injunction is based. In contrast, the nationwide injunction immediately exposes employers to significant liability for following their consciences. Neither equity nor the APA could possibly justify a nationwide injunction on this record, even apart from the general impropriety of such extraordinary relief.

I. THE EXPANDED EXEMPTIONS ARE LAWFUL

A. The ACA Authorizes The Expanded Exemptions

1. Respondents contend (Br. 29-35) that the ACA gives HRSA no discretion to account for employers' religious and moral beliefs in formulating guidelines for the women's preventive-care provision, 42 U.S.C. 300gg-13(a)(4). That is incorrect. Section 300gg-13(a)(4) states that health plans and issuers are required to cover such preventive services "as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." *Ibid.* Nothing in that text requires HRSA to ignore conscientious objections in developing its guidelines. And when HRSA adopts guidelines that respect such objections, the statute

gives HRSA's choice effect: an employer is not required to provide coverage in a manner broader than the one "provided for" and "supported" by HRSA. *Ibid.*

Respondents argue (Br. 31-32) it does not matter whether HRSA actually "provide[s] for" or "support[s]" a requirement that employers with conscientious objections provide contraceptive coverage. In their view, HRSA's only "role is to 'support[]' the comprehensive guidelines themselves" by "funding" their creation. Resp. Br. 32 (brackets in original). That reading is incompatible with the statutory text. If HRSA announced it no longer agreed with a requirement of previously issued guidelines, and therefore no longer "supported" the portion of the guidelines in which that requirement had been "provided for," no one would contend employers were still required to comply just because HRSA had funded its creation. Similarly here, HRSA no longer "support[s]" guidelines that require contraceptive coverage by employers with sincere objections, and such coverage is no longer "provided for" in its guidelines. Consequently, under a straightforward reading of the statutory text, employers with such objections are not required to offer contraceptive coverage.

2. Respondents suggest (Br. 33-34) the agencies' reading should be viewed skeptically because Congress would not have delegated "politically significant questions, such as the scope of conscience-based exemptions," "to HRSA." But *Hobby Lobby* foreclosed this argument when it explained that Congress "did not specify what types of preventive care must be covered," instead "authoriz[ing] [HRSA] to make that important and sensitive decision." 573 U.S. at 697. In entrusting HRSA to decide whether to require contraceptive coverage *at all*, Congress plainly did not foist upon it an all-

or-nothing choice: require all employers to cover contraception, or none to do so. Instead, Congress gave HRSA the authority, subject to the APA's arbitrary-and-capricious-standard, 5 U.S.C. 706(2), to require such coverage by most employers while exempting a small number with sincere conscientious objections. Indeed, that is precisely what the prior Administration did in crafting both the church exemption and the "accommodation," which effectively exempts self-insured church plans. Under respondents' atextual interpretation, however, both of those existing measures would violate Section 300gg-13(a)(4).

Respondents' only rejoinder is to assert (Br. 35) that *part* of the church exemption is required by the First Amendment. But respondents do not dispute that the church exemption covers *all* employees of a church and its integrated auxiliaries, and *all* churches and integrated auxiliaries—regardless of whether they even object to providing contraceptive coverage. Nor do respondents dispute that the prior Administration expressly invoked Section 300gg-13(a)(4), not the Constitution, as the basis for the church exemption, explaining that under Section 300gg-13(a)(4), it was "appropriate [for] HRSA, in issuing these Guidelines, [to] take[] into account the effect on the religious beliefs of certain religious employers." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Respondents' attempt to reconcile their reading of Section 300gg-13(a)(4) with the long-accepted church exemption is thus both unavailing and anachronistic.

Respondents also assert (Br. 34) that, because Congress provided a statutory exemption for grandfathered plans, "other ex[em]ptions should not be assumed." See 42 U.S.C. 18011(a). But no statutory exemption is "as-

sumed" here. Congress gave HRSA authority to promulgate guidelines that reflect a broad range of considerations, see Gov't Br. 16-17, and HRSA used that authority to establish the church exemption, the effective exemption for self-insured church plans, the accommodation more generally, and now, the new exemptions.

Nor can respondents draw support (Br. 33) from the 2012 *failure* of a proposed statutory conscience exemption. Legislative history makes clear the amendment was rejected because its opponents believed it was overbroad and, significantly, because HRSA *already had authority* to craft regulatory exemptions. As Senator Kerry explained, HRSA's efforts "to reach a final accord" that both protects women and "also protects religious liberty is a far better outcome than to have the Senate rush to undercut that effort and pass something that is overly broad." 158 Cong. Rec. 2631 (2012); cf. *id.* at 2629 (Senator Collins suggesting amendment was necessary because HRSA was not using its regulatory authority aggressively enough). It was thus common ground that Section 300gg-13(a)(4) authorized HRSA to craft exemptions.

B. The Expanded Religious Exemption Is Proper Under RFRA

The expanded religious exemption is also required, and at the very least authorized, by RFRA.

1. RFRA requires the expanded religious exemption

a. Respondents contend (Br. 38) RFRA cannot support the expanded religious exemption because the existing "accommodation * * * does not substantially burden religious exercise." Respondents' argument, however, is irreconcilable with this Court's decisions.

It cannot seriously be disputed that the prior regulatory regime forced some employers to engage in conduct that they believed their religion forbade. See Little Sisters Br. 35-39. Religious employers like the Little Sisters believe that performing the actions required by the accommodation makes them morally complicit in the provision of contraceptive coverage, and their religious beliefs thus forbid them from performing them. See 83 Fed. Reg. 57,536, 57,545-57,546 (Nov. 15, 2018). Imposing significant monetary fines on such employers for adhering to their faith is a textbook substantial burden. See *Hobby Lobby*, 573 U.S. at 726.

Respondents' contrary argument (Br. 38) requires second-guessing those religious beliefs, asking whether in a court's view the particular act required represents a "considerable demand." But this Court has repeatedly refused to provide secular answers to such religious questions, holding that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). That is especially evident with the religious and moral question about when "an act that is innocent in itself" nevertheless makes the actor complicit in "an immoral act by another." *Hobby Lobby*, 573 U.S. at 724. Neither a court nor a government agency can tell employers that "the line [they] underst[an]d [their] faith to draw when it c[omes] to complicity" is misplaced. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1153 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring), aff'd, 573 U.S. 682 (2014). Instead, "[t]he narrow function of a reviewing court" is "to determine whether" the objector would refrain from the activity in

question "because of an honest conviction that such [activity] was forbidden by his religion." *Thomas*, 450 U.S. at 716; see *Hobby Lobby*, 573 U.S. at 723-726.

In any event, the objecting employers' belief that complying with the accommodation would violate their faith is readily understood. Respondents suggest (Br. 38-39) that submitting the form required by the accommodation is an essentially meaningless act. But as then-Judge Kavanaugh explained, "the form matters and plays a role in this scheme. After all, if the form were meaningless, why would the Government require it?" *Priests for Life* v. *United States Dep't of Health & Human Servs.*, 808 F.3d 1, 20 (D.C. Cir. 2015) (dissenting from the denial of rehearing en banc). In the case of a self-insured plan, the employer's submission is used to require its third-party administrator to provide coverage through the employer's own plan. See 29 C.F.R. 2590.715-2713A(b)(2); see also *Sharpe Holdings, Inc.* v. *United States Dep't of Health & Human Servs.*, 801 F.3d 927, 935 (8th Cir. 2015), vacated and remanded, 136 S. Ct. 2006 (2016).[1] And for plans that are not self-insured, the form either directly notifies the insurance issuer of its need to arrange alternative coverage or provides the government with the issuer's contact information so the government can ensure contraceptive coverage is arranged. See 45 C.F.R. 147.131(d)(ii). That facilitation is not immaterial; in-

[1] Thus, even for self-insured church plans, where the government cannot force a third-party administrator to provide coverage (see Gov't Br. 4-5), the employer's submission affirmatively authorizes the third-party administrator to do so, which itself can be an affirmative act forbidden by an employer's faith.

deed, the government required the form precisely because it was "necessary * * * to administer the accommodation." 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014).

Respondents' reliance (Br. 40) on *Bowen* v. *Roy*, 476 U.S. 693 (1986), is thus misplaced. There, the claim the Court rejected concerned *the government's use* of a social security number to identify the claimants' daughter on internal governmental records. See *id.* at 699. Here, in contrast, religious employers object to the actions *they* are required to engage in, because they believe those actions make them morally complicit in the provision of contraceptive coverage. *Roy* illustrates the critical difference: while the Court rejected claims based on the government's internal use of social security numbers, five Justices recognized that the government could not force the claimants to themselves include social security numbers on their welfare applications, because that affirmative act would (in their view) make them morally complicit in a system that deprived their daughter of spiritual power by identifying her by number. See *id.* at 715-716 (Blackmun, J., concurring in part); *id.* at 724-733 (O'Connor, J., concurring in part and dissenting in part); *id.* at 733 (White, J., dissenting). That is the part of *Roy* relevant to this case.

b. Under RFRA, the government could not impose a substantial burden on religious exercise unless doing so was the least restrictive means of furthering a compelling governmental interest. The prior regime was not.

Respondents focus (Br. 42) on the importance of "access to contraception," observing that it "prevent[s] unintended pregnancy" and "allows women to participate more fully in the workforce." That, however, is not the relevant interest, since there are many other ways to further it. After all, contraception is widely available.

Any woman whose employer-provided health plan does not cover contraception is entitled to purchase it on the open market. Moreover, women can often access contraception through family members' health plans or (for women with limited resources) existing government programs. See Gov't Br. 26-27. And as the Court explained in *Hobby Lobby*, if those avenues are insufficient, the "most straightforward way" of providing access to contraception would be "for the Government to assume the cost of providing" it. 573 U.S. at 728.

The relevant interest, instead, is the government's interest in providing "seamless" coverage as part of an existing benefits plan and, more specifically, in requiring that for plans of objecting employers. For as the Court has explained, the government must prove a compelling interest in "application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 573 U.S. at 726 (citation omitted). In the government's considered view, no such compelling interest exists here.

Indeed, the government has consistently exempted other employers whose decision not to provide coverage has the same effect on the availability of "seamless" coverage to their employees. The government did so first through the church exemption, which applied to *all* employees of churches and church auxiliaries, regardless of whether the churches even object to contraception. See p. 5, *supra*. And it also did so through application of the "accommodation" to self-insured church plans,

which effectively exempted them. See Gov't Br. 4-5.[2] Collectively, these covered a diverse array of organizations, including elementary and secondary schools, colleges and universities, charitable organizations, hospitals, and other healthcare providers. Those existing exemptions undermine any argument that the government has a compelling interest in forcing other employers with the same exact religious objections to offer "seamless" contraceptive coverage, just as the religious exemption for peyote users undermined the argument that the government had a compelling interest in refusing to exempt religious users of other Schedule I controlled substances in *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 433 (2006).[3]

In short, having previously recognized that the church exemption and the effective exemption for self-insured church plans would not undermine any compelling governmental interests, the agencies correctly recognized that the expanded exemption here would not either.

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[2] Respondents argue (Br. 44) that third-party administrators of self-insured church plans "are willing to voluntarily provide separate coverage," but that is not true for all of them, as respondents elsewhere acknowledge (Br. 40-41). And more fundamentally, the "voluntar[y]" nature of the effective exemption shows that the government does not have a compelling interest in *requiring* health plans of employers with religious objections to provide contraceptive coverage.

[3] Respondents focus (Br. 44-45) exclusively on *O Centro*'s treatment of the government's asserted interest in "uniformity." But *O Centro* recognized more broadly that where the government has previously granted analogous exemptions that had the same effect on the government's asserted interest as the requested exemption, the government's provision of the former undermines its interest in refusing to provide the latter. See 546 U.S. at 433.

2. RFRA at the very least authorizes the expanded religious exemption

Ultimately, this Court need not resolve whether RFRA *requires* the expanded religious exemption, because RFRA at the very least *authorizes* it.

Where application of federal law to a particular person imposes a substantial burden on religious exercise, RFRA gives the government two options. It "may" attempt to "demonstrate[]" in litigation "that application of the burden" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b)(2). Or it can recognize an "exemption[]" voluntarily. 42 U.S.C. 2000bb-4 ("Granting * * * exemptions * * * shall not constitute a violation of this chapter.").

At a minimum, cases like *Ricci* v. *DeStefano*, 557 U.S. 557 (2009), illustrate that the government has flexibility to navigate between potentially conflicting statutes where there is a "strong basis" to believe following one would violate the other, *id.* at 583—a principle that applies with particular force here, since RFRA applies to and supersedes the ACA. See 42 U.S.C. 2000bb-3(a) (RFRA "applies to all Federal law, and the implementation of that law"). And in this case, the government plainly has a "strong basis" for believing that the prior regime violated RFRA.

Accordingly, RFRA gives the government discretion to craft a traditional exemption even if a court might have approved something less. Indeed, to hold otherwise would be inconsistent with *Zubik*, which ordered the agencies to consider modifying the original accommodation *even assuming that it fully complied with RFRA*. 136 S. Ct. at 1560. That order would have made

no sense if, as respondents assert, RFRA does not authorize any accommodation that it does not affirmatively require.

Respondents nevertheless argue (Br. 48) that RFRA affords agencies no leeway about how to accommodate religion because it "is a limitation on government power, not a grant of it." But that is a non-sequitur. The "limitation on government power" RFRA imposes, *ibid.*, is its general rule: "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. 2000bb-1(a). Thus, if application of a general statute or regulation would impose a substantial burden on religious exercise, RFRA affords the government discretion to *alleviate* that burden through an exemption in the course of "implement[ing]" "Federal law." 42 U.S.C. 2000bb-3(a); see Independent Women's Law Ctr. Amicus Br. 4-7.

Respondents' alternative standard—RFRA permits only what it affirmatively requires—is also unworkable. It would require the government to divine the stingiest accommodation a court might approve—no more, no less. The government would be "nearly guaranteed to be wrong, no matter what it does." Professor Douglas Laycock Amicus Br. 7. If it were insufficiently accommodating, it would violate RFRA. And if it were more accommodating than strict scrutiny demands, that would be unlawful, too. See *ibid.* But as the Little Sisters pithily explain (Br. 33), RFRA does not impose a "least accommodating alternative" requirement. Instead, RFRA grants the government the "room for play in the joints" that it has traditionally enjoyed when accommodating religious exercise. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970).

3. The government need not impose burdens on religious objectors to benefit third parties

Finally, respondents contend (Br. 47, 50-51) the expanded religious exemption is impermissible because it creates "third-party" burdens. That is incorrect. The expanded religious exemption no more "harm[s]" women (Br. 47) than does the church exemption or effective exemption for self-insured church plans. Especially given that the ACA neither creates a statutory right to contraceptive coverage nor requires the government to confer one by regulation, there is no basis for respondents' suggestion (*ibid.*) that "the government" has taken away something women are "guarantee[d]" by "the law." Instead, as in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 337 & n.15 (1987), any burden on third parties flows from a private employer's religious decision—here, the decision not to cover contraception. And as respondents appear to accept, the government has no "obligation to force private parties to benefit * * * third parties." Resp. Br. 47 (quoting 83 Fed. Reg. at 57,549). For that reason, too, the expanded religious exemption is appropriate under RFRA.

II. THE FINAL RULES ARE PROCEDURALLY VALID

Respondents contend (Br. 17-29) that the final rules are procedurally invalid because the agencies issued the interim rules without notice and comment. That claim is triply flawed: The final rules are independently valid because they fully comply with the APA's requirements. And the interim rules were justified by two separate exceptions to the notice-and-comment requirement.

A. The Final Rules Are Procedurally Valid Regardless Of Whether The Interim Rules Were

1. The only live dispute concerns the application of the *final* rules. Gov't Br. 33. Those rules complied with the APA under a straightforward reading of its text. The agencies provided "[g]eneral notice of proposed rule making" and "an opportunity to participate in" the final rulemaking, 5 U.S.C. 553(b)-(c), by publishing the interim rules, soliciting "public comments on all matters addressed in" the interim rules, 82 Fed. Reg. 47,792, 47,813, 47,854 (Oct. 13, 2017), and stating their intent to "finalize th[]e rules at a later date," *id.* at 47,852. After receiving more than 100,000 comments, 83 Fed. Reg. at 57,540, 57,596, the agencies issued the final rules "with changes in response," *id.* at 57,537, 57,592, and a detailed explanation "respond[ing] to significant comments," *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). The APA demands no more. *Id.* at 102.

Respondents contend that the final rules "were not the outgrowth of processes initiated by 'notice[s] of proposed rule making.'" Br. 25 (quoting 5 U.S.C. 553(b)). That places form over substance. Nothing in the APA requires "notice of proposed rulemaking," 5 U.S.C. 553(b), to be formally labeled as such (*e.g.*, "NPRM"). Nor does anything preclude agencies from providing "notice of proposed rule making" by soliciting comments on an interim rule subject to future revision. *Ibid.* By publishing the interim rules and soliciting comments in anticipation of final rulemaking, the agencies provided notice indistinguishable from that in a typical NPRM. Indeed, Pennsylvania's Attorney General signed a comment opposing the "proposed" interim rules. Regulations.gov, State Attorneys General Comment 1 (Dec. 5, 2017), https://go.usa.gov/xv5rK.

As respondents acknowledge (Br. 26-27), agencies have for decades treated interim rules that solicit comment in anticipation of final rulemaking as notices of proposed rulemaking, and courts have long upheld the resulting final rules against APA challenges. Of particular relevance, the agencies here have three times before—in 2010, 2011, and 2014—implemented Section 300gg-13(a)(4) by issuing interim rules adopted as final rules after considering comments. Gov't Br. 7-8. Those rules include the contraceptive-coverage mandate and accompanying church exemption. *Ibid.* Under respondents' reading of the APA's notice requirement, those prior rulemakings—and countless others—would be procedurally suspect. Cf. Little Sisters Br. 45-48.

2. Respondents' principal procedural claim (Br. 25-29) is that a more stringent standard of open-mindedness should apply to final rules that follow improperly issued interim rules. But respondents never address the central flaw in that theory: the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *Perez*, 575 U.S. at 102 (citation omitted), and it does not include the heightened standard they propose, see Gov't Br. 34-35.

Respondents' position is also illogical. In their view (Br. 27-28), the "standard for evaluating a properly issued rule cannot be the same as salvaging an improperly issued one, or the distinction between pre- and post-promulgation comment would be meaningless." That reasoning conflates the procedural validity of *interim* rules and *final* rules. When an agency issues an interim rule subject only to "post-promulgation comment," the "standard for evaluating" whether the rule was "properly issued," *ibid.*, is whether the agency justifiably invoked an exception to the notice-and-comment

requirement. But when an agency solicits comments on a rule (either interim or proposed), considers and responds to significant comments, and thereafter adopts a final rule, the *final* rule *is* issued following "pre * * * -promulgation" comment, *ibid.*, and is valid because it complies with the APA's procedural requirements.

Contrary to respondents' position (Br. 25-28), the procedural validity of a final rule cannot turn on whether the preceding interim rule is ultimately found procedurally valid. The final rule's validity turns on whether the interim rule provided the requisite notice and opportunity to comment on the final rule, a question that has nothing to do with whether the interim rule was properly issued. An interim rule either provides the requisite notice or does not. Indeed, agencies often will not even know whether an interim rule is valid when they issue the final rule. See Gov't Br. 8 (noting that agencies' appeal of injunction of interim rules was pending when agencies issued final rules). Tying the procedural validity of the final rule to the procedural validity of the interim rule is thus "illogical and incorrect." Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 725 (1999) (Asimow).

Respondents' invocation of the purported "'psychological and bureaucratic reality'" that agencies will be less receptive to comments on "binding" interim rules only proves the point. Br. 25 (citation and brackets omitted). There is no reason why agencies will be more wedded to a valid "binding" interim rule than an invalid one. So if an interim rule ultimately found invalid does not provide adequate notice and a meaningful opportunity to comment, neither will a valid one. Respondents' position would therefore undermine multiple rules implementing Section 300gg-13(a)(4)—including the

contraceptive-coverage mandate and church exemption—because they were adopted through the *same* procedures as the expanded exemptions.

3. Even if some heightened open-mindedness standard applied, the agencies would meet it. The district court found, and respondents have not contested, that the agencies carefully considered and responded to all significant comments. Pet. App. 30a n.24, 135a-137a. And while respondents assert (Br. 27) that the final rules "readopted the same analysis" as the interim rules, they concede that an "agency's failure to make" changes to interim rules "does not mean its mind is closed," *Advocates for Highway & Auto Safety* v. *Federal Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994). It is therefore unclear what more respondents think the agencies should have done to show open-mindedness, other than make ill-advised changes just to ward off an APA challenge.

Respondents suggest (Br. 28-29) that the agencies could have "abandoned" the rulemaking and started over with a new NPRM, as the agency did in *Bowen* v. *American Hospital Ass'n*, 476 U.S. 610 (1986). But nothing in *Bowen* remotely suggests that an agency *must* follow that costly and duplicative course. And it is not even clear that doing so would satisfy respondents' standard for purging the taint of a procedurally invalid interim rule, assuming the agencies retained the substance of the rule without major changes. Respondents' conception of open-mindedness thus appears to require something approaching capitulation.

4. Ultimately, respondents' APA challenge can prevail only if final rules that follow procedurally defective interim rules are categorically invalid. That position

would work a sea change in administrative law, "invalidating hundreds of thousands of pages of rules at tremendous costs." Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261, 321 (2016) (Hickman & Thomson); see Pet. 31. Respondents suggest (Br. 29) their position is necessary to prevent circumvention of the notice-and-comment requirement. But agencies have no incentive to promulgate improper interim rules they know will be vacated, because that would inflict needless administrative costs for no possible benefit. Gov't Br. 37-38. Respondents offer no answer.

B. The Interim Rules Were Also Procedurally Valid

In any event, the interim rules themselves were procedurally valid, because the agencies had both express statutory authorization and good cause to issue them without prior notice and comment. Gov't Br. 38-42. Respondents suggest (Br. 18-19) this argument exceeds the scope of the question presented, but it is directly responsive to whether "the agencies' decision to forgo notice and opportunity for public comment before issuing the interim final rules rendered the final rules" procedurally invalid. Pet. I; see Pet. 28; Pet. App. 23a-28a. The issue is therefore "fairly included" in the question presented. Sup. Ct. R. 14.1(a).

1. The agencies properly issued the interim rules under 42 U.S.C. 300gg-92 and identical statutes authorizing them to "promulgate any interim final rules as the Secretary determines are appropriate to carry out" the relevant statutory provisions. *Ibid.*; 29 U.S.C. 1191c; 26 U.S.C. 9833. In respondents' view, that authorization is insufficiently "express[]" to justify departure from the APA's notice-and-comment requirement, Br. 19

(quoting 5 U.S.C. 559), because it does not "mention[] the APA or notice-and-comment rulemaking," *ibid.* But this Court has held that a statute "expressly supersede[d]" the APA even though it did not mention the APA or its procedural requirements. *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955). And lower courts have concluded that statutes authorizing "interim final rule[s]" without mentioning the APA or notice-and-comment rulemaking are sufficiently express to supersede that requirement. *Asiana Airlines* v. *FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998). The same is true here.

Respondents contend (Br. 20-21) that the "interim final rules" authorized by the statutes can be issued only after notice and comment. But that proposed definition contradicts the statutory text, which authorizes interim rules "as the Secretary determines are appropriate." 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833. Respondents' position also defies the widely accepted definition of an "interim final rule" as a rule issued "without prior notice [or] comments" that "solicit[s] comments" in anticipation of final rulemaking. 1 Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* § 5.10, at 647 (6th ed. 2019); see Gov't Br. 39. Respondents cite (Br. 20) a few interim rules issued after some form of notice and comment, but those scattered examples show at most that agencies may solicit prior comment on interim rules if they choose. Moreover, respondents appear to accept (Br. 21) that the statutes authorize interim final rules without prior notice and comment "to allow for * * * inter-agency coordination." That acknowledgment undermines respondents' narrow definition of "interim final rules" in the authorizing statutes, which contain no such limitation. 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833.

Finally, respondents' position is irreconcilable with longstanding agency practice. Since the statutes were enacted in 1996, the agencies have issued more than two dozen rules pursuant to their authorization, *none* of which followed APA notice-and-comment procedures or sought "to allow for * * * inter-agency coordination." Resp. Br. 21; see Gov't Br. 40. Respondents' position thus means that every interim rule ever issued under the statutes—including the one implementing the contraceptive-coverage mandate and church exemption—lacked statutory authorization. More broadly, respondents' view would undermine huge numbers of rules adopted under the widespread understanding that interim final rules can be issued without notice and comment. See, *e.g.*, Hickman & Thomson 298 (noting that "hundreds of thousands of pages of" regulations were issued through interim rules "not subjected to prepromulgation notice and comment"); Asimow 714-715 (finding that agencies issue hundreds of interim rules each year without notice and comment).

2. The interim rules were independently justified by the "good cause" exception to the notice-and-comment requirement. 5 U.S.C. 553(b)(B); see Gov't Br. 41-42. Respondents acknowledge (Br. 24) that the interim rule adopting the contraceptive-coverage mandate was justified by good cause given the need to provide coverage without delay. The interim rules protecting employers from devastating penalties for violating their sincere religious and moral beliefs were equally justified. Indeed, that is presumably the "good cause" that justified the church exemption (which respondents conspicuously ignore in their discussion of this exception) and the multiple grants of interim relief to religious employers in prior litigation. 82 Fed. Reg. at 47,814. Respondents

contend (Br. 23) that the agencies could have protected objecting employers by adopting "an enforcement safe harbor during the rulemaking process." But that is mistaken, because objecting employers would still be subject to liability in private enforcement suits. The agencies reasonably concluded that exposing objecting employers to such liability during the notice-and-comment process would be "contrary to the public interest." 5 U.S.C. 553(b)(B).

III. AT A MINIMUM, THIS COURT SHOULD VACATE THE NATIONWIDE INJUNCTION

If the Court concludes that one or both of the final rules are likely invalid, it should narrow the scope of the injunction to the respondent States.

A. Respondents do not dispute that constitutional and equitable principles allow a court to award relief only as necessary to remedy a plaintiff's injury, which generally forecloses nationwide injunctions. Gov't Br. 43-46. Respondents nevertheless contend (Br. 52-55) that their asserted injury warrants nationwide relief. They suggest they will be injured if an in-state resident (1) is covered by the plan of an out-of-state employer that invokes an expanded exemption; (2) thereafter both wants and lacks access to affordable contraception; and then (3) either (a) seeks subsidized contraception from respondents, or (b) does not use contraception, gets pregnant, and seeks related services from respondents. Respondents, however, have yet to identify a single individual who will cause that asserted injury. Pet. App. 19a. In contrast, the nationwide injunction immediately exposes objecting employers to significant liability for following their consciences. Even assuming respondents' envisioned injury may someday material-

ize in Pennsylvania and New Jersey, no remedial principle could justify enjoining the exemptions *nationwide*. See *California* v. *Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (narrowing nationwide injunction of the interim rules to state plaintiffs), cert. denied, 139 S. Ct. 2716 (2019).

B. Respondents alternatively contend (Br. 53-54) that the APA justifies the nationwide injunction. But they offer no textual argument for why the APA's provision that a "reviewing court shall * * * hold unlawful and set aside agency action" allowed the district court to set aside the final rules *universally*, rather than as applied to the parties. 5 U.S.C. 706(2). Indeed, because the APA *requires* a court to "set aside" unlawful agency action, respondents' erroneous interpretation would mean courts *must* enter nationwide relief when they find agency action unlawful. *Ibid.* Respondents suggest (Br. 53) that "this Court has granted or affirmed such relief on multiple occasions." But none of the cited decisions addressed the scope of the relief, so they cannot "constitute precedents" on that issue. *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). By contrast, courts addressing the question have long held that "[n]othing in the language of the APA" requires an unlawful regulation be "set[ ] aside * * * for the entire country." *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 394 (4th Cir. 2001).

That position is grounded in the APA's text, structure, and history. Section 703, which governs the "form of proceeding for judicial review," contemplates "form[s] of legal action, including * * * writs of prohibitory or mandatory injunction," that have long been limited to the parties. 5 U.S.C. 703. Section 705, which permits preliminary injunctions, incorporates the traditional

standard that such relief should be limited as "necessary to prevent irreparable injury," which necessarily applies only to parties. 5 U.S.C. 705. And Section 706 "does not deal with remedial orders at all," but simply "directs the court not to decide [a case] in accordance with [an unlawful] agency action." John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, Yale J. on Reg. (Apr. 12, 2020), https://www.yalejreg.com/bulletin/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies/. To the extent Section 706 affects remedies, moreover, its "language is most naturally understood as requiring that defective agency action—including agency rules—be set aside *as to the plaintiffs who brought suit*, rather than as to the Nation as a whole." Nicholas Bagley & Samuel L. Bray Amicus Br. 14.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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